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December 19, 2008

Stephanie L. Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

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DEC 22 2008
PUBLIC SERVICE
COMMISSION

RE: *Brandenburg Telephone Company, et al v. Windstream Kentucky East LLC*
Case No. 2007-00004

Dear Ms. Stumbo:

Enclosed herewith is an original and ten copies of Intervenor's Response to Windstream's Motion to Dismiss in the above referenced case.

Please acknowledge receipt by returning a stamped copy of this filing via the enclosed, self-addressed stamped envelope.

Sincerely yours,

Douglas F. Brent

DFB: jms
Enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Brandenburg Telephone Company; Duo County Telephone)
Cooperative Corporation, Inc.; Highland Telephone)
Cooperative, Inc.; Mountain Rural Telephone Cooperative)
Corporation, Inc.; North Central Telephone Cooperative)
Corporation; South Central Telephone Cooperative)
Corporation, Inc.; and West Kentucky Rural Telephone)
Cooperative Corporation, Inc.)

Complainants)

v.)

Windstream Kentucky East, LLC)

Defendants)

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PUBLIC SERVICE
COMMISSION

CASE NO.
2007-00004

INTERVENORS' RESPONSE TO WINDSTREAM'S MOTION TO DISMISS

NuVox Communications, Inc., Sprint Communications Company, L.P.; Sprint Spectrum, L.P. and SprintCom, Inc. d/b/a Sprint PCS; Nextel West Corp., Inc.; and NPCR, Inc., d/b/a Nextel Partners ("Sprint Nextel"), T-Mobile USA, Inc., Powertel/Memphis, Inc., T-Mobile Central LLC and tw telecom of ky llc, (hereinafter collectively "Intervenors") submit this response to the Motion to Dismiss filed December 8, 2008 by Defendant Windstream Kentucky East, LLC. As explained below, this case is not moot and should not be dismissed unless, at a minimum, the challenged tariff is withdrawn.

In its Motion, Defendant claims that certain of the RLEC Complainants have "removed any transit traffic" from Windstream's network, and others are working to reach "appropriate"

transit traffic agreements, making the Complaint moot. Intervenors, who each obtain transit service under filed interconnection agreements, do not agree that the Complaint is moot.

As Intervenors pointed out in their motions to intervene, the availability of transit service will always be critical to a competitive local telecommunications market in Kentucky. In an arbitration that preceded Windstream's challenged tariff filing the Commission confirmed that transit service is a § 251 element that should be priced at TELRIC and subject to the negotiation and arbitration provisions of the Telecommunications Act.¹ Even if Complainants were to withdraw the complaint, the Commission would need to clarify that Defendant's transit rates are subject to further review consistent with those earlier determinations. Otherwise, the challenged tariff will continue to create controversy.

Defendant correctly points out that Intervenors have agreements with Windstream with respect to transit traffic. Thus, the tariff rates do not apply to Intervenors today. That does not end the controversy. While the terms and prices in the challenged tariff may not apply now to traffic exchanged between Intervenors and Windstream, as a practical matter the tariff could establish a price floor for future negotiations between Windstream and *any carrier* needing transit service. Windstream will have little incentive to agree to a rate lower than the tariffed rate if it can simply default to the tariff and demand a rate much higher than would result from meaningful negotiations. This result would be undesirable and would undermine the Commission's policy decisions about pricing for transit service.

¹ *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xsepdius Management Co. of Lexington, LLC and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Case No. 2004 - 00044, *Order*, September 26, 2005 at 15. As a result of a merger, Xspedius is now tw telecom of ky llc.

There are other issues related to transit arrangements that were not raised directly by Complainants yet are critical in any investigation of Windstream's tariff filing. One issue relates to the general question of how transit arrangements should be determined. The Commission has already stated "this proceeding will determine whether such [transit] rates, if deemed reasonable, can be placed into a tariff or, as argued by the RLECs, if such arrangements should be individually negotiated, placed into written agreements, and then filed for review and approval by the Commission." *Order*, November 13, 2007, p. 4. Until the Commission makes that determination or Windstream withdraws its tariff, this case is not moot.

Moreover, Intervenors have not been invited to or given notice of any negotiations between the RLECs and Windstream, and those parties' status reports to the Commission have been sketchy at best, but the fact that some RLECs are *moving their traffic* away from transit arrangements with Windstream suggests that Windstream's pricing, not network efficiencies, may be driving some decisions.

Finally, even if all of the RLECs were to stop using Windstream as a transit provider, the Commission would still need to consider whether Windstream's tariffed transit rate is reasonable. The Commission has not reviewed Windstream's cost studies for the tariffed transit rate and has not established a procedure whereby other parties could do so. Since any default rate for transit service should be set at TELRIC, the controversy will not end unless the Commission completes its investigation or the tariff is withdrawn.

For the reasons stated above, Intervenor respectfully request that this Motion to Dismiss be denied.

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Counsel for Sprint Nextel

A handwritten signature in black ink, appearing to read 'D. Brent', with a long horizontal line extending to the right from the end of the signature.

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T-Mobile USA, Inc., Powertel/Memphis, Inc.,
T-Mobile Central LLC and tw telecom of ky llc

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Intervention has been served by U.S. mail on those persons whose names appear below this 19th day of December, 2008.



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